forfeited and paid to the government revenue. But as the trial Court made no finding on this issue at the end of the case which had the advantage of seeing and listening to the witnesses and the respondent in the witness box, I am of the view that justice demands that I should not make a finding solely based on the cold prints of the evidence recorded in this case.

(c) Conclusion:

Having therefore considered the judgment of the trial Court and the grounds submitted by the appellant, the Public Prosecutor, and having heard the submissions of the learned Deputy and the learned Counsel for the respondent for the reasons abovestated I hereby allow the appeal and set aside the order of acquittal of the respondent.

After having made such order the next question is whether I should substitute the finding to one of guilty. In view of the unsatisfactory features and conclusions in the judgment of the trial Court including the failure to consider the case as a whole in the light of evidence adduced by the prosecution and the defence I am of the view that in the interest of justice the proper order to make in this instant case is to order for a retrial of the respondent before another Sessions Court Judge and I so order. I also set aside the order of forfeiture of RM120 made by the trial Court.

PUBLIC PROSECUTOR

v.

MOHD. JAMIL B. YAHYA & ANOR.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CRIMINAL TRIAL NO. 47-3-92]
26 SEPTEMBER 1993

DANGEROUS DRUGS: Trafficking - Whether informer was a spy or an agent provocateur - Common intention - Custody and Control - Sections 39(B)(1)(a), (2) Dangerous Drugs Act 1952.

EVIDENCE: Exception to hearsay rule - Declarant dead - Bad character - No corroboration - Weight to be given - Section 32(1)(i) Evidence (Amendment) Act 1993.

A car driven by the 1st accused was stopped at a road block. A bag containing 5 packages of dried leaves was found on the floor board in front of the front passenger seat. The 2nd accused was sitting in the front passenger seat. The prosecution, from the facts, could not show common intention of both accused in respect of the offence as it was not shown which of the two accused put the bag in the car.

The prosecution, however, also relied on a statement made by Azali bin Mat Jam, deceased, made during the course of an investigation under s. 112 of the Criminal Procedure Code involving the two accused to prove its case. Azali bin Mat Jam, deceased, was the person who gave signal to the police before the two accused left in the car. The prosecution admitted the said statement under s. 32(1)(i) Evidence (Amendment) Act 1993. In the statement Azali implicated both the accused of trafficking in cannabis. It also contained hearsay evidence and revealed Azali's bad character.

Held:

[1] The weight and degree of credit to be attached to a statement by a declarant under paragraph (i) who is patently not disinterested must be examined with the greatest of caution lest false stories or a false colouring to the stories given by the declarant in the statement makes the Court draw a jaundice view of facts which cannot be verified through the cross-examination of the declarant and facts which may falsely implicate an accused. And more so where an accused faces a charge carrying a

mandatory sentence of death on conviction on the charge.

[2] In the present case the declarant did not expressly state anywhere in his statement that he had been employed by the police either as a spy or an agent *provocateur* to procure the commission of the offence of the trafficking in a dangerous drug. The prosecution did not adduce any evidence other than to show that the police had employed the declarant as an informer. Such evidence should have been adduced since the prosecution intended and did use the statement of the deceased declarant and it was to their advantage to show he was an informer in the case from an earlier stage. There was no such evidence. While it can be concluded that the declarant was an informer in relation to the activities that were to take place that fateful night, it cannot be concluded that he was an informer in respect of the acts and omissions of the declarant *vis-a-vis* the two accused before that night.

[3] The statement of the declarant was recorded some 1 year 5 months after the date of arrest of the two accused. A look at the statement does show that his recollection of certain events outside his house on the day the two accused were arrested, and his role at that state was that of an informer, is at variance with the recollection of those events by inspector Jamaluddin. There certainly was no corroboration of what little that can be corroborated.

[4] While there is evidence to show that one of the two accused had placed the bag of cannabis in the car there is no evidence which one of the two did it. There is no evidence as to which had custody or control of the bag of drugs from which a presumption of knowledge of the drug or trafficking in it can be made against that person. And there is no evidence to show any act on the part of the other person that he knew the contents of the bag let alone that he was acting in concert with the man who put the bag into the car.

[Both accused acquitted and discharged].

Cases referred to:
R v. Abbot [1955] 2 All ER 899 ***(refd)***
Shamsuddin bin Hassan & Anor. v. PP [1991] 3 CLJ 2414 ***(refd)***
Chan Phuet Khoon v. PP [1962] MLJ 127 ***(refd)***
Davies v. DPP [1954] AC 378 ***(refd)***
Mohamed Din v. PP [1985] 1 CLJ 356 / [1985] 2 MLJ 251 ***(refd)***
R v. Brickley [1909] 2 Criminal Appeal R 53 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (2)
Evidence Act 1950, s. 32, 33, 133, 114, 158
Evidence (Amendment) Act 1993, s. 32(1)
Evidence Ordinance 1950, s. 32
Penal Code, s. 34
Evidence Act, s. 32(1) to (8) (India)

Other sources referred to:
Sarkar on Evidence (Reprint 1990), p. 369, 370, 1280

For the public prosecutor - Abdul Razak b. Musa, DPP
For the 1st accused - V. Rajadevan (Siti Hajar with him); M/s. Malek & Devan
For the 2nd accused - Khairul (Zulhaimi with him); M/s. Hairul & Associates; M/s. Zulhaimi & Co.

JUDGMENT

K.C. Vohrah J:

The two accused were charged that on 21 September 1990, at about 9.30 p.m., in front of the Alor Janggus Police Station, they, with common intention, trafficked in 9831 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) read with s. 34 of the Penal Code and punishable under s. 39B(2) of the Act.

The unchallenged evidence of Inspector Jamaluddin (PW7) was that on 21 September 1990, at about 8.45 p.m., he kept observation, with two police personnel inside a car, on a house No. 98, Kampong Nelayan, Kuala Perlis, Perlis. He saw a car, a Proton Saga, PBR 9739 parked in front of the house. At about 8.50 p.m. 2 male persons came out of the said house. One of them went to the car and took out something. Then the two persons went to the rear of the said house. At about 9 p.m. the two persons came back to the front of the house. One of them carried a bag. The said bag was placed in the compound of the house. Then the two persons went back to the said house and about 5 to 10 minutes later 3 male persons came out from the house. One of them picked up the bag and took it to the car and opened the front left door of the car and placed it inside the car. The man then went inside the car. The inspector said he saw 2 persons enter the said car. The third person stood in front of the car. As the car started to move, this third person (who is now deceased and whose name was Azali bin Mat Jam) gave a signal to the Inspector.

The following facts are also not disputed. The Inspector contacted DSP (then ASP) Syed Ismail, PW6, who was stationed in a car with a police

driver at the Petronas petrol station along Jalan Kuala Perlis as soon as he saw the car leave. DSP Syed Ismail in turn contacted Inspector Ibrahim (PW4) at the Alor Janggus police station to set up a road block. All 3 cars proceeded in the direction of Alor Setar. The suspect car stopped at the road block which was placed in front of the Alor Janggus police station. The road block was manned by Inspector Ibrahim bin Deraman (PW4) and his men. The 1st accused was the driver of the suspect car. On being requested for his identity card he gave it to the police. The 2nd accused was sitting in the front passenger seat. A bag containing 5 packages of dried leaves was found on the floor board in front of the front passenger seat. The bag and the 5 packages were seized by Inspector Ibrahim.

It is not disputed that the bag contained cannabis and that the 5 packages contained dried plant material. The government chemist, PW3, who conducted tests on 100 random and representative samples from the 5 packages, 20 samples from each of the 5 packages, concluded that the dried plant material was cannabis, a dangerous drug within the meaning of s. 2 of the Act. The cannabis weighed 9831 grammes. It is not disputed that the bag and the 5 packages of plant material were in the proper custody and care of the investigating officer of the case, Inspector Ramli bin Abu Samah, between the time they were handed over to him by Inspector Ibrahim up to the time Inspector Ramli handed them over to the chemist, PW3, and between the time they were returned to him by the chemist and the time they were produced in court.

The facts so far disclosed do not show common intention of both accused in respect of the offence. A bag containing 5 packages of proscribed cannabis was found in the car but it was not shown which of the two accused put the bag in the car. Bearing in mind *R v. Abbot* [1955] 2 All ER 899 as it was applied in *Shamsuddin bin Hassan & Anor. v. PP* [1991] 3 CLJ 2414, on the facts so far adduced the prosecution has not made out a *prima facie* case against both the accused.

The prosecution, however, also relied on a statement made by a deceased person during the course of an investigation under s. 112 of the Criminal Procedure Code involving the two accused to prove its case.

As was briefly mentioned earlier, the person who gave a signal to Inspector Jamaluddin at No. 98, Kampong Nelayan, Kuala Perlis, Azali bin Mat Jam, has since died. The wife of the man, PW10, testified that she witnessed the burial of the man on 24 October 1992 in Kangar. On 25 February 1992 this said man made a statement under s. 112 of the Criminal Procedure Code and the statement was recorded by Inspector Ramli bin Abu Samah. Since he is dead his statement made in the course of an investigation into an offence under the Dangerous Drugs Act 1952 was admitted under s. 32(1) (i) of the Evidence Act 1951 (as amended by Act A 851 which came into force on 16 July 1993).

In that statement (P22), Azali, a self confessed trafficker in cannabis, seemed to implicate the 1st accused with the purchase of the bag of cannabis that was seized and to peripherally implicate the second accused with the seized bag.

I have, however, several misgivings over the statement made by the deceased declarant which is admissible under a new exception to the Hearsay Rule.

There were 8 exceptions to the hearsay rule provided under s. 32 of the Evidence Act before 16 July 1993, the date when the Evidence (Amendment) Act 1993 came into force. This new exception and another exception were introduced by the amending Act (which also brought in other amendments) and these exceptions to the hearsay rule apply only in relation to a criminal proceeding.

For ease of reference, s. 32, as amended by the amending Act, is set out below and it will be noticed that the two new exceptions to the hearsay rule are paragraphs (i) and (j) of what is now s. 32(1):

> 32. (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in

which the cause of that person's death comes into question.

Such a statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

(b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

(c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;

(d) when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which if it existed he would have been likely to be aware, and when the statement was made before any controversy as to the right, custom or matter had arisen;

(e) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;

(f) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when the statement was made before the question in dispute was raised;

(g) when the statement is contained in any document which relates to any transaction as is mentioned in s. 13(a);

(h) when the statement was made by a number of persons and expressed feelings or impressions on their part relevant to the matter in question.

(i) where the statement was made by in the course of, or for the purposes of, an investigation or enquiry into an offence under or by virtue of any written law; and

(j) where the statement was made by a public officer in the discharge of his duties.

(2) The provisions of paragraphs (i) and (j) of subsection (1) shall apply only in relation to a criminal proceeding.

In respect of paragraphs (a) to (h) of s. 32(1), they are in *pari materia* with paragraphs (1) to (8) of s. 32 of the Indian Evidence Act and the principle for having the original eight exceptions to the hearsay rule is explained in **Sarkar on Evidence** (Reprint 1990), p. 370, quoting from **Wigmore** (ss. 1420-22),

> The purpose and reason of the hearsay rule is the key to the exceptions to it. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment - for example, by reason of the death of the declarant -, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. A perception of these two principles (a Necessity for the evidence and a Circumstantial Probability of Trustworthiness) and their combined value has been responsible for most of the hearsay exceptions.
>
> The scope of the first principle may be briefly indicated by terming it the Necessity principle.

> The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing.
>
> The second principle which is termed Circumstantial Guarantee of Trustworthiness, is in the nature of a practical substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner.
>
> The following different classes of reasons underlie the exceptions:
>
> (a) Where, the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed.
> (b) Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment would probably counteract its force.
> (c) Where, the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

According to the learned authors of **Sarkar** the exceptions to the hearsay rule in paragraph (a) to s. 32(1) [dying declaration] rests on reason (b) (fear of divine punishment); those in paragraph (b) [entries in the course of business, etc.] rest on reasons (a), (b) and (c); those in paragraph (e) [declarations against pecuniary interest] rest on reason (a); that in paragraph (d) [opinion as to public right, etc.] rest on (a), (b) and (c); those in paragraphs (c) and (f) [declarations about pedigree] rest on (a) and (c); those in s. 32(1)(g) [expressions of feelings] rest on reason (a).

The exception to the hearsay rule introduced by paragraph (j) to s. 32(1) may rest on reason (a) but it is difficult to see on which class of reason the exception contained in paragraph (i) can rest. A statement by a disinterested witness may probably justify paragraph (i) as an exception to the hearsay rule, the exception resting on reason (a), but can there can be justification for the statement of a person who confesses to committing some offences under a written law and who implicates an accused in one of them to rest on reason (a) or any of the other reasons? I do not think so. Parliament, while allowing for the admission under s. 32 of such statement, surely requires judicial safeguards to be considered in regard to the weight and credit to be placed on such a statement by a declarant who cannot be considered as a disinterested witness and who cannot be subject to cross-examination.

The declarant, like the declarant of a drying declaration who cannot be subject to cross-examination in Court, should be open to impeachment and discrediting in the same way as other witness. As was observed by **Wigmore** s. 1446, in respect of a dying declaration (see quotation from **Sarkar,** *ibid*., p. 369),

> The dying declaration being in effect a testimonial statement made out of court, the declarant is open to impeachment and discrediting in the same way as other witness, so far as such a process is feasible. Thus, impeachment by bad testimonial character is allowable, or by conduct showing a revengeful or irreverent state of mind at the time, or by conviction of crime, or by prior or subsequent statements. So also he may be corroborated by evidence of similar consistent statements, so far as this is allowable by the principles of that subject.

In *Chan Phuet Khoon v. PP* [1962] MLJ 127 Chan was convicted on a charge of intending to cause miscarriage of a woman, an act which caused the death of the said woman. The woman had made statements to her husband and the doctor at the hospital which were admitted under s. 32 of the then Evidence Ordinance 1950. The Court of Appeal set aside the conviction and ordered a retrial and this observation of Thomson CJ (as he then was) at p. 128 on the matter of the dying declaration and the credibility of the dead declarant is instructive,

> The only observation we had to make regarding it is that the only evidence which unequivocally connected the accused, the appellant with the subsequent abortion and death of the woman Pang Ngee Moi consisted of statements made by that woman to her husband and to the doctor at the hospital prior to her death. These statements were admitted in evidence by reason of the provisions of s. 32 of the Evidence Ordinance 1950 and once they were admitted they became evidence of the facts contained in them. They were the voice of the woman speaking from beyond the grave. They were the substitute for the oral evidence which she could have given had she been alive.
>
> ... He discusses at very great length and with considerable perspicuity a number of issues in the case. ... But nowhere does he discuss the

> credibility of the dead woman. ... (We) are forced to the conclusion that he did not apply his mind to the vital issue in the case, which was: Did that voice from beyond the grave speak the truth? Was it to be relied upon?

To be noted, too, is that the principle of impeaching and discrediting or corroborating the declarant of a dying declaration is recognised by a statutory provision and in fact extends to all declarants of statements made admissible under ss. 32 and 33 of the Evidence Act as s. 158 of the Evidence Act provides that whenever any statement relevant under s. 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

In my view the weight and degree of credit to be attached to a statement by a declarant under paragraph (i) who is patently not disinterested must be examined with the greatest of caution lest false stories or a false colouring to the stories given by the declarant in the statement makes the court draw a jaundiced view of facts which cannot be verified through the cross-examination of the declarant and facts which may falsely implicate an accused. And more so where an accused faces a charge carrying a mandatory sentence of death on conviction on the charge.

The statement of the deceased Azali contains hearsay evidence and also reveals his bad character. In addition to seemingly implicate the 1st accused for the purchase of the bag of cannabis and to seemingly implicate the 2nd accused peripherally with the bag that was seized by the police, the declarant, in hearsay allegations, supposedly made by one Meli (who the prosecution say cannot be traced), tried to show how the 1st accused through this Meli was intent on purchasing cannabis. Inspector Ramli, (PW10) the investigating officer of the case, said that after he had recorded the statement (P22) from the declarant, the declarant promised that he would himself show Meli to the Inspector at Langkawi. However, the declarant did not turn up at Langkawi and when the Inspector contacted him, the declarant told the Inspector that he could not come to Langkawi as his uncle had passed away. Was Meli a figment of the imagination of the declarant to implicate the accused? If he was not, he would have been a useful prosecution witness to have had in court to bear witness on the several allegations in the statement.

As to the infamous character of the declarant, the uncontradicted evidence of a prosecution witness under cross-examination - that of his wife (PW10) - was that he had been detained in Alor Setar Prison in 1989 for a drug offence. The fact that he was held in prison and not in a police lockup means that in all probability a charge had been preferred against him and that he had been remanded in prison. The charge may have been withdrawn but the prosecution did not adduce any evidence to that effect. His role in illegal drug activities is further revealed in the statement, P22, made by him. There he talked of one Meli contacting him to supply cannabis. The implication is clear. He was obviously a supplier of cannabis, a proscribed drug. And the statement also reveals that he placed an order for cannabis with a named person in Thailand, that he collected the cannabis which was brought in at the Kuala Perlis Jetty (Jetty Lama), that he conveyed it to his premises for safekeeping. This is the cannabis which the police found in the car driven by the 1st accused at the road block. Each of the acts which he did was an act of trafficking in a dangerous drug within the meaning of the definition of "trafficking" in s. 2 of the Act. And all these acts were done well before the date on which the two accused were arrested, and it appears, without the knowledge of the police, for it appears the police made use of the declarant only later to arrest the accused. In other words it is only at the later stage that he became an informer.

If the declarant was an accomplice in the sense that he was *particeps criminis* in respect of the actual crime charged, or a person procuring, aiding or abetting (see *Davies v. DPP* [1954] AC 378 at 400) then if the declarant were alive and gives evidence in court his evidence would as a matter of prudence be required to be corroborated on material particulars (see illustration (b) of s. 114 read with s. 133 of the Evidence Act 1950 and the case of *Mohamed Din v. PP* [1985] 2 MLJ 251.)

If the declarant was not an accomplice, assuming he is alive and he gives evidence in Court, then if he joined in, or even provoked the crime as a police spy (see *R v. Brickley* [1909] 2 Criminal Appeal R 53) the rule of corroboration does not apply.

But how does one determine whether a person is an accomplice?

As pointed out in **Sarkar**, p. 1280,

> The point for determination appears to be whether the witness entered into the conspiracy with the sole object of detecting and betraying it or whether he is a person who concurred fully in the criminal design of his co-conspirators for a time and joined in the execution of these till out of fear or for some other reason he withdrew from the conspiracy and gave information to the authorities. If he extends no aid to the prosecution until after the offence has been committed, he would be an accomplice. If he originally joined the conspiracy with the sole object of taking part in the crime, he cannot change his position to that of an informer by subsequently giving information of the crime [see *Karim v. R*, 9L 550; *Pulin v. R*, 16 CWN 1105, 1148, *R v. Chaturbhuj*, 38 C 96; *Mohan Lal v. R*, A 1947 N 109).

In the present case the declarant did not expressly state anywhere in his statement that he had been employed by the police either as a spy or an agent *provocateur* to procure the commission of the offence of the trafficking in a dangerous drug. However, Inspector Kamaruddin did indicate in his evidence that the declarant signalled to him when the car, with the 1st and 2nd accused as occupants in it, moved off from his house that fateful night. The prosecution did not adduce any evidence apart from that to show that the police had employed the declarant as an informer. Such evidence should have been adduced since the prosecution intended and did use the statement of the deceased declarant and it was to their advantage to show he was an informer in the case from an earlier stage. I can only infer that there was no such evidence. While it can be concluded that the declarant was an informer in relation to the activities that were to take place that fateful night, I cannot conclude that he was an informer in respect of the acts and omissions of the declarant *vis-a-vis* the two accused before that night.

For the informer who does not need to be corroborated he, at the least, can be cross-examined and his evidence tested. The statement (P22), however, even assuming it was made by an accomplice, cannot be verified by cross-examination. The declarant was a character not inspiring of credit and now, he not being available for cross-examination, it is hard to test and verify the allegations he has made against the 1st and 2nd accused. As was pointed out earlier the statement, in addition to revealing that he had committed offences relating to the trafficking of cannabis, also reveals his easy access to a named source for the supply of cannabis implying prior connection with a source who trusted him well enough to despatch 10 kilogrammes of cannabis on his order 3 days after he contacted him and implying previous criminal activities on the part of the declarant in respect of cannabis, a dangerous drug.

Finally, it has to be noted that the statement of the declarant was recorded some 1 year 5 months after the date of arrest of the two accused. The evidence was that the recording officer repeatedly told the declarant or left word for him to have his statement recorded but the declarant had ignored the requests of the officer until 25 February 1992. A look at the statement does show that his recollection of certain events outside his house on the day the two accused were arrested, and his role at that state was that of an informer, is at variance with the recollection of those events by Inspector Jamaluddin. There certainly was no corroboration of what little that can be corroborated.

I have serious misgivings on the credit worthiness of the statement and it is safer for me not to place any reliance on it.

Thus, at the end of the case for the prosecution while there is evidence to show that one of the two accused had placed the bag of cannabis in the car there is no evidence which one of the two did it. There is no evidence as to which had custody or control of the bag of drugs from which a presumption of knowledge of the drug or trafficking in it can be made against that person. And there is no evidence to show any act on the part of the other person that he knew the contents of the bag let alone that he was acting in concert with the man who put the bag into the car. As adverted to earlier, on the basis of *R v. Abbot* and *Shamsuddin bin Hassan & Anor. v. PP*, I hold the prosecution has not proven its case and both the accused are entitled to be acquitted. They are acquitted and discharged.